Five Star Air Freight Corporation *and* Local 161, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4–CA–10618

March 25, 1981

DECISION AND ORDER

On November 4, 1980, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in support of the Decision of the Administrative Law Judge and in response to the Respondent's exceptions and brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Five Star Air Freight, Essington, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 1(c):

"(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act."

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: Upon charges filed against Five Star Air Freight Corporation (hereinafter called Respondent), the General Counsel issued a complaint as amended on July 22, 1980, alleging that Respondent unlawfully discharged employees Marjorie Charlier and Susan Armstrong and engaged in a series of reprisals against two other employees, Janet Patterson and Doris Cornish, who were reinstated pursuant to a prior order, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter called the Act). Respondent filed timely answers denying the allegations in the complaints.

Thereafter, on August 4 and 5, 1980, a hearing was held before me in Philadelphia, Pennsylvania, at which time all parties were given an opportunity to examine and cross-examine witnesses.

Based on the entire record in this case,[1] including the testimony of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation in the business of forwarding air freight, maintains a facility in Essington, Pennsylvania. During the past year, Respondent grossed revenues in excess of $500,000 and purchased goods valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania. Accordingly, upon the foregoing facts, I find, as admitted in the answer, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party Union (hereafter referred to as the Union) is a labor organization within the meaning of Section 2(5) of the Act.

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings. The Administrative Law Judge's Decision contains inadvertent errors noted herein as follows: (1) in sec. III,C, p. 6, l. 5, she refers to the separation from employment of Charlier and Armstrong as July 24. However, as she finds elsewhere in the Decision, the record indicates they were advised of their separations on October 24, (2) in sec. III,B, p. 4, l. 7, she refers to October 19, 1980, as the date the employees went to lunch at a nearby restaurant. The record reveals this luncheon occurred on October 19, 1979.

In determining that the discharges of Charlier and Armstrong violated Sec. 8(a)(3), the Administrative Law Judge relied on the principles of *Wright Line, Inc.*, 251 NLRB 1083 (1980), but concluded that the asserted legitimate reasons for selecting Charlier and Armstrong were pretextual, i.e., specious, and thus nonexistent. In such cases, Member Jenkins considers *Wright Line*, which is designed to separate the weight and effects of two genuine motives for a discharge, one lawful and one unlawful, is of little use, since only the unlawful motive is genuine.

[2] In her Order, the Administrative Law Judge uses the narrow cease-and-desist language, "In any like or related manner." However, in the notice, she uses the broad language of "in any other manner." We shall modify the recommended Order to contain the "in any other manner" language in the pertinent provision, as the Respondent has engaged for the second time in a 2-year period in extensive unfair labor practices and thus, has shown a proclivity to violate the Act and a general disregard for the employees' fundamental statutory rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[1] After the close of the hearing, the General Counsel moved to correct the official transcript. Respondent opposed the motion only insofar as it related to two items: the substitution of "20" for "22" after the word October on p. 265, and the exchange of the words "accounts receivable" and "accounts payable" on p. 305. It is clear from the entire record, that these and other unopposed requested changes would accord with what the witnesses may have intended to state. However, I find no evidence in extra-record sources including my own notes and personal recollection which would show that the transcript did not accurately reflect the words of the various witnesses, albeit misstated. Accordingly, the General Counsel's motion with respect to corrections on p. 25, 305, and 314 which fall into the category of substantive changes is denied.

The General Counsel also proposed certain revisions of the transcript to correct errors where the court reporter inadvertently omitted or misspelled words. Since these changes are of a technical nature and were not opposed, they are approved. Accordingly, certain errors in the transcript are hereby noted and corrected.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent's operation at its Essington, Pennsylvania, facility, is subdivided into various departments including accounts receivable, data processing, traffic, sales, and operations, with a total work force of approximately 50 to 55 employees, including supervisors.

In July 1978, some of Respondent's employees sought the support of the Union in an effort to organize the plant. Approximately 1 month later, four key union proponents were discharged. Proceedings before the National Labor Relations Board resulted in a Decision and Order (245 NLRB 173) dated September 21, 1979, which found that the Company had engaged in a series of unfair labor practices including unlawful threats to and interrogation of employees and the discharge of the union supporters. On or about October 13, the Board notice was posted on the company bulletin board announcing, among other things, that the discharged employees had to be offered reinstatement. Three of the four accepted Respondent's offer of rehire.

B. *Renewed Union Activity*

Marjorie Charlier was employed by Respondent as a C.O.D. clerk in the accounts receivable department on July 21, 1978. She played no role in the initial phase of the Union's campaign, and, although she received an authorization card, feigned ignorance when questioned about the union by her then supervisor. However, after the discharge of the four employees mentioned above, Charlier maintained contact with the Union's business representative and spoke to fellow employees in defense of the discharged workers when the occasion arose. Among the employees to whom Charlier could freely express her prounion attitudes was Sue Armstrong, hired into the traffic department in September 1978. Admittedly, both Charlier and Armstrong were guarded in expressing their views during the pendency of the unfair labor practice proceeding.

However, the promulgation of the Board notice emboldened the women to engage in more overt organizational efforts. Armstrong and Charlier began contacting a number of employees and collecting their addresses on company premises during working hours, explaining that it was for a mailing annoucing a forthcoming union meeting and discussing with them the benefits of union representation. Two of the employees in her department to whom Armstrong spoke, Dawn Jardine and Marion Grisafi, expressed disinterest in the Union.

Then, on October 19, 1980, some 15 to 20 employees went to lunch at a restaurant near the facility. At that time, in response to a number of questions posed by Chris Fahey, Charlier spoke of the advantages of unionization, mentioning that higher wages were paid by other companies which were unionized. Armstrong also expressed her support for the Union, stressing in particular, the security it could provide for unmarried persons like herself who had no other source of income. Fahey indicated that she was not in favor of a union.

Fahey returned to her office and, admittedly upset by her luncheon conversation, immediately told coworker Cass Majey that there were union grumblings again, and reviewed what Charlier and Armstrong had said in behalf of the Union. Fahey could not recall whether Maureen Cratty, then assistant personnel director[2] whose desk was close by, was present during her conversation with Majey. Cratty denied overhearing Fahey, suggesting that her desk radio which she plays at a high volume, together with other office noises, might have prevented her from hearing this or other conversations about union activity in the plant. Cratty acknowledged that she was friendly with both Fahey and Majey and chatted with them about personal matters during the day, but socialized only with Majey after working hours.

C. *The Discharges*

Of the three previously discharged employees who accepted reinstatement, one was placed in the data processing department where a vacancy existed. However, in order to make room for the two other returning employees, Doris Cornish and Janet Patterson, Respondent determined it would have to terminate two current employees whose rates of pay were comparable and whose jobs were similar to those previously performed by Cornish and Patterson.

Dennis Gunn, vice president and general manager of the Company, took on the task of identifying an employee for discharge from the accounts receivable department and asked Frank Siciliano, manager of the traffic department, to select someone from his staff. Gunn testified that, approximately a week before the terminations actually occurred, he asked Maureen Cratty for the personnel folders of employees in accounts receivable. After reviewing these files, Gunn stated that he picked Charlier for discharge based on his assessment of her work evaluation, absentee record, and general attitude. In particular, Gunn referred to an incident which he said occurred early in the year, when Siciliano had complained about several employees, including Charlier, presenting themselves in his department and disrupting the work of his staff. He regarded Charlier's attitude, that this is the manner in which she conducted herself on the job, as less than satisfactory and characterized her work as mediocre. He admitted paying little attention to the July 1979 evaluation in her folder on which Marge McCarty, her immediate supervisor, gave her an outstanding rating in 3 of 11 categories, and very good in 7 others. Several comments about the necessity to improve her attendance also appeared in the file. Although he did not examine the daily attendance cards in Charlier's folder and was unaware that she had been hospitalized for 2 weeks in September, he stated that he had a generalized view of her absenteeism and that this was one of several adverse factors which figured in his selection process.

Some 3 or 4 days prior to October 24, after he decided that Charlier would be terminated, Gunn testified that he advised Cratty of his choice and asked her to prepare a list documenting the absences of other employees in ac-

[2] Cratty was promoted to personnel manager in January 1980.

counts receivable so that he might compare their records with that of Charlier.[3]

Cratty's recollection of the events surrounding Charlier's selection is that she and Gunn reviewed the personnel folders of accounts receivable employees together. At one point in the hearing, she testified that she and Gunn mutually chose Charlier for discharge, and, at another time, stated that she was not advised that Charlier or Armstrong would be dismissed until October 23.

In selecting an employee from the traffic department for termination, Siciliano explained that he narrowed the notice to three women in comparable positions: Armstrong, Jardine, who was employed on the same day as Armstrong, and Grifasi, who was hired 6 months later. He ultimately selected Armstrong because she was unmarried and had expressed some dissatisfaction with the size of her last pay raise, whereas the other two women were married and therefore more likely to be content with incomes which supplemented those of their husbands. Siciliano reasoned from this that Armstrong was less likely to be a long-term employee.

At the end of the workday on Wednesday, July 24, Charlier and Armstrong were advised individually of their separations. Charlier vehemently protested, and asked Cratty and McCarty whether they were aware of the NLRB notice. Their response was that they were not attempting to prevent her from speaking about union matters.

The following Monday, Janet Patterson stepped into the job vacancy created by Charlier's dismissal, assuming duties which were in some respects different than the ones she performed in the accounts payable department prior to her discharge.[4] Doris Cornish returned on November 5 and was assigned to Armstrong's former position. In May 1980, Patterson voluntarily left Respondent's employ and was replaced with an inexperienced trainee.

D. *Alleged Retaliatory Acts*

Janet Brutchi, executive secretary to Respondent's president and vice president, testified that at midday on December 18, 1979, while performing some errands at a shopping center, she encountered Doris Cornish in a department store dressed in blue jeans and a gold coat. Suspicious because Respondent's employees do not wear jeans to work, Brutchi contacted Cornish's supervisor, Siciliano, who informed her that Cornish called in sick that morning. After Brutchi reported this matter to Pettinelli, Cornish was denied sick leave pay for the day.

Cornish contended that she was home ill all day, and denied being in the department store or owning a gold coat at that time.

In early January 1980, Cornish asked Siciliano if she could take a week's vacation starting February 23. She offered to take the leave without pay but indicated she needed a response by February 1 so that timely reservations could be made. Siciliano stated that he had no objection particularly since there were other employees in the department who could handle her work. Nevertheless, he said he would have to clear the matter with Gunn.

Relying on a rule in the Company's manual which provides that vacations shall be taken between April through September, Gunn initially denied the request. However, after Cornish spoke to an NLRB compliance officer about the matter, Gunn reversed himself and on February 4 granted leave, too late for Cornish to take her vacation.

On December 26, Janet Patterson telephoned her supervisor, McCarty, and said she was ill and would be going to a doctor. Later that day, Patterson phoned Cratty from the physician's office to report that she had a throat infection and was compelled to remain home another day. Patterson asked if she would like to confirm this information with the physician, but Cratty responded that it would be unnecessary.

Subsequently, Cratty withheld Patterson's pay for both December 24 and 25, pursuant to a company rule which stated that employees must work the full day immediately prior to and following a holiday, unless other arrangements have been made with the employee's supervisor.

In March 1980, Patterson was required to take a day off to attend to her sick daughter. She requested permission to attribute the day to her vacation leave, rather than taking off a personal day. Invoking the rule that vacations were to be taken between April and September, Cratty denied Patterson's request.

Then, on or about March 29, Pettinelli summoned Patterson to his office where he accused her of preparing a letter regarding a forthcoming union meeting on a company typewriter during working hours, and of reproducing the letter on the Company's photocopier. Patterson admitted typing the letter at her desk, but insisted that she had done so during her lunchbreak and had it reproduced outside the plant. During the same interview, Pettinelli stated that he had in his possession signed statements that she was engaging in discussions about the Union with employees on company time and company premises. When Patterson denied such activity, Pettinelli indicated that other employees might have been involved, but, since she was the union spokesman, he would hold her responsible. He also stated that he did not know where she had gone wrong several years ago; that she ought to be channeling her energies into more productive outlets. The interview terminated with Pettinelli advising Patterson that this would constitute her second warning; that he could fire her for using the typewriter, but would simply suspend her for 3 days without pay.

Discussion

A. *Discriminatory Discharges*

There is no dispute that Respondent was entitled to reduce its staff in order to create openings for the two employees it had to reinstate in accordance with the Board's Order. However, even if this is conceded, the

[3] The record shows that, apart from her 2-week hospitalization in September, Charlier was absent 11 days in 1979, as was employee Pat Wright. Two other employees were absent 7 days and another one for 4 days.

[4] The accounts payable department was merged into the traffic department prior to the time the material events described herein took place.

question remains as to whether Charlier and Armstrong were chosen for discharge because of their union advocacy, or as the Respondent contends, for bona fide business considerations.

In dual motive cases such as this, where legitimate and invidious motives may coexist, the General Counsel bears the initial burden of making a *prima facie* showing sufficient to support the inference that the protected conduct of the employees was a motivating factor in the employer's decision. Once this is accomplished, the burden shifts to the employer to prove by a preponderance of the evidence that it would have reached the same decision even had the employees not been engaged in union activities. *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

Fundamental to the General Counsel's case-in-chief is a showing that the employer had knowledge of the employees' union activities and that the actions it took against the employees were motivated by union animus. Here, the evidence that Respondent harbored antiunion sentiments and was willing to convert its antipathy into action could not be more clear. By way of background, the General Counsel referred to the Board's decision of September 21, 1979, holding that Respondent engaged in a series of unfair labor practices including interrogation, threats, coercion, and discharges of its employees. Thus, just prior to the terminations at issue here, the Respondent was confronted with a broad order enjoining it from interfering in any manner with its employees' organizational rights and to reinstate the employees it had unlawfully ousted for engaging in protected conduct. *Five Star Air Freight, supra.* Further, at the hearing in this matter, the president of the Company admitted that he was opposed to the unionization of employees at its Essington facility. Coupled with his admission, the blatantly antiunion statements which Pettinelli made to Patterson during his interview with her in April 1980, provide ample proof that Respondent's antiunion proclivities continued unabated from the time of the first union campaign until long after the discharge in question here.[5]

The record also establishes that Charlier and Armstrong were engaged in union activities both in and outside the plant. Prior to the issuance of the Board's decision in September, they were purposely discrete in disclosing their support for the Union. Therefore, prior to September 1979, knowledge cannot be imputed to Respondent. See *K. B. Mounting, Inc.*, 248 NLRB 570 (1980). However, after the Board's notice was posted at the plant, Charlier and Armstrong believed the situation had changed. In the week prior to their discharge, they abandoned caution and spoke about a forthcoming union meeting with a number of workers during working hours at the plant. In light of the small size of the facility and the fact that their conversations occurred at times and in places which were likely to have been observed by or reported to supervisory personnel, there is reason to believe that management soon was aware of their activity even in the absence of direct proof. *Coral Gables Nursing Home*, 234 NLRB 1198 (1978); *Malone Knitting Company*, 152 NLRB 643 (1965), affd. 358 F.2d 880, 883 (1st Cir. 1966); *Wiese Plow Welding Company, Inc.*, 123 NLRB 616 (1959).

Moreover, it is uncontroverted that Chris Fahey immediately related Charlier's and Armstrong's prounion statements to fellow employee Majey who shared an office and socialized with Cratty. This does not, of course, provide concrete evidence that Charlier's and Armstrong's union efforts came to Respondent's attention. Indeed, Cratty, Pettinelli, Gunn, and Siciliano denied any knowledge of the employees' efforts. However, I was unconvinced by management's denials. In fact, their assiduous efforts to disclaim such knowledge led me to conclude, as did Hamlet, that they protest too much.

Cratty was an evasive witness who appeared to temper her responses to questions in a manner calculated to please her superiors. In addition to an unpersuasive demeanor, contradictions in her testimony cast doubt on her veracity. For example, she stated that she played a radio at her desk quite loudly, implying that this prevented her from overhearing nearby conversations. Yet, she also admitted engaging in personal conversations on a regular basis with the employees sharing her office. At one point, she stated that she reviewed personnel files with Gunn and that they mutually arrived at the decision to terminate Charlier, thereby contradicting prior testimony that she was not advised of the terminations until the day before they were announced. More telling is Cratty's reaction when Charlier alluded to the Board notice at the time she was discharged: she and McCarty were quick to point out that they were not attempting to inhibit Charlier's right to discuss the Union. Unless they were aware that Charlier was engaged in union discussions, this remark is a *non sequitur.* Gunn and Pettinelli did not impress me as altogether reliable witnesses either. To justify the finality of the discharges, Gunn stated unequivocally that it was company policy to terminate rather than lay off employees. Yet, as the Board's decision showed, management styled the dismissals of union activists in 1978 as layoffs and, in fact, recalled one of the employees suspended at that time. Pettinelli claimed that he played no role in the decision to terminate Charlier and Armstrong. If he was not involved, it is difficult to account for Cratty's sending him a memo dated October 22, 2 days before the dismissals, listing the absences of each accounts receivable employee with the exception of Charlier.

Given Cratty's obvious loyalty to the Company, I have not the slightest doubt that as soon as she learned of Charlier's and Armstrong's union support, she reported it to management. The fact that the two persons discharged were the only ones identified as union spokesmen, in itself supports the inference that the Respondent was aware of their union activity. *Hurst Performance, Inc.*, 242 NLRB 121 (1979); *Nebraska Bulk Transport, Inc.*, 240 NLRB 135 (1979), modified 608 F.2d 311, 315–317 (8th Cir. 1979).

To negate this inference Respondent pointed out that another union adherent, Pat Wright, was not discharged.

[5] Respondent's motion to sever the charges concerning reprisals against the reinstated employees was denied at the hearing. Upon consideration of the entire record, I am even more convinced that it would be a fiction to ignore the intimate connection between the various allegations of the original and amended complaint.

This argument has little merit, however, for the record contains no evidence of any union activity by Wright which would bring her to Respondent's attention at the time of the terminations. It is noteworthy, in this regard, that Fahey did not mention Wright's name to Majey when she reported that there were renewed "union grumblings."

The abruptness of the discharges provides additional grounds to suspect Respondent's motivation. See *Hurst Performance, Inc., supra.* Respondent insisted that it terminated the employees solely to make room for the reinstated workers. Yet, the discharges occurred midweek and were effective immediately, although one replacement was not due until 5 days later and the other, a week after that. Respondent offered no rational explanation for the summary nature of the terminations, raising questions as to why it chose to create a situation in which no employee proficient in C.O.D. work remained to train Patterson.

Based on the foregoing, I find that the General Counsel has established a *prima facie* case that Charlier's and Armstrong's union activity was a significant factor in Respondent's decision to discharge them.

In defense, Respondent claimed that it discharged Charlier because her absenteeism and general attitude at work made her the weakest of its accounts receivable employees. Armstrong was selected for discharge allegedly because she was unmarried and therefore, less likely to remain a permanent member of a stable work force.

It is an oft-repeated principle that an employer may discharge an employee for good or bad cause, or no cause at all, as long as antiunion considerations are not at the root of its behavior. *Nebraska Bulk Transport, Inc., supra; Borin Packing Company, Inc.*, 208 NLRB 280 (1974); *N.L.R.B.* v. *Ace Comb Company*, 342 F.2d 841 (8th Cir. 1965). In this case, the Respondent's attempts to bring itself within the first part of this principle failed for the record reveals that the reasons asserted by Respondent for the discharges were conveniently invoked to conceal its antiunion motivations.

Charlier did have more absences than other employees in accounts receivable. However, "the fact that a lawful cause of discharge is available is no defense where the employee is actually discharged because of his union activities." *N.L.R.B.* v. *Ace Comb Company, supra* at 847. Here, although Gunn alleges that one of the factors prompting his selection of Charlier was her absenteeism, he admitted he had neither examined the individual attendance slips in her personnel file nor compared her absences with those of other employees prior to selecting her for discharge. Thus, he chose Charlier with only a vague idea of her attendance record. Moreover, almost half of Charlier's absences in 1979 stemmed from a 2-week hospitalization in September. Prior to that time, her absences were equalled by one other employee and did not greatly exceed those of several other employees in accounts receivable. Subsequent to this hospitalization her attendance record showed a marked improvement. Gunn denied knowledge of Charlier's hospital stay, but in a facility with a total work force of 55, it is difficult to believe he was unaware of the absence of the employee solely responsible for the C.O.D. accounts for that length of time. By feigning ignorance of Charlier's absence in September, Gunn apparently was attempting to bolster his assessment of Charlier as an unreliable employee who absented herself without justification.

Gunn's view that Charlier's attitude and demeanor were objectionable was based primarily on an incident in which Siciliano reported that she, among other employees, was visiting with employees in the traffic department and thereby disrupting their work. However, Gunn indicated that other employees engaged in the same behavior and, indeed, the record shows that personal exchanges among the employees were commonplace.[6]

Gunn's characterization of Charlier's work as mediocre had no support in the record. In fact, had he examined the most recent evaluation in her personnel folder, he would have discovered that her immediate supervisor rated her a very good, even an outstanding, employee who "shows an excellent quality of work" and an exemplary ability to work harmoniously with others.

In short, Respondent's portrayal of Charlier as the most undesirable of its accounts receivable employees was distorted and unconvincing.

Respondent's assertion that Armstrong was dismissed because as an unmarried woman she would be less content with her job was equally contrived and incredible.

Whether other persons would consider the reason which Respondent offered for dismissing Armstrong justified or fair is not necessarily the test of its legitimacy. See *Borin Packing Company, Inc., supra* at 281. At the same time, when an employer offers a reason for its actions, the Board is entitled to determine whether that reason is rational in light of the employer's stated end.

Married women are frequently victims of employment discrimination because employers allegedly believe that domestic demands cause them to be unstable employees. Respondent apparently does not hold to that view. However, Respondent's purported belief that single women are less stable employees than their married counterparts was never convincingly explained by Respondent's witness, Siciliano. It is ironic and curiously coincidental that, at the time of the discharge, Siciliano ascribed married women workers' stability to the fact that their incomes are supplemental to those of their husbands, when a few days previously, Armstrong expressed the view to Fahey that the Union was needed to protect the security of women employees whose incomes were not supplemental to those of their husbands. If Siciliano's selection of Armstrong for separation were based on a genuine concern for a stable work force, it is peculiar that he should speculate about the impermanence of unmarried women and ignore concrete factors such as longevity, aptitude for the work, or other proven indicia of stability. Siciliano alleges that he gave considerable thought to the matter, yet was unable to cite any criteria other than Armstrong's unmarried status and an expression of discontent with the size of her recent wage increase (following a laudatory work evaluation), as the bases for his decision. It is also noteworthy that both women Siciliano

[6] Although Siciliano sent a memo dated September 22 to McCarty complaining about Charlier's visits to his department, Gunn indicated his conversation with Siciliano had taken place months before.

preferred to retain had expressed their disinterest in the Union.

Given the defects in the asserted reasons for discharging Charlier and Armstrong as discussed above, I am unable to conclude that Respondent has met its burden of proving that it would have selected the same employees for layoff even if they had not participated in union activity. See *Wright Line, Inc., supra.* It follows that by discharging Charlier and Armstrong on October 24, 1979, Respondent violated Section 8(a)(1) and (3) of the Act.

B. *Retaliatory Acts*

The record also leaves no doubt that Respondent's union animus and chagrin at having to reinstate employees who were early activists in the Union's campaign explains the retaliatory actions taken against them.

Respondent, through Vice President Gunn, attempted to justify its initial denial of vacation leave to Cornish by resorting to a rigid application of its rule that vacations must be taken from April through September. However, Cornish's immediate supervisor initially had no objection to her request and acknowledged that there were other employees who could perform her duties in her absence. Moreover, the record reveals that the rule had been bent on more than one occasion for employees DeStefano and Komerowski. Although management subsequently reversed its decision, its initial denial, stemming from an unlawful motive, constituted a violation of Section 8(a)(3) and (1) of the Act.

Similarly, Respondent's withholding Janet Patterson's holiday pay in December 1979 and suspending her without pay in April 198O are obvious mainfestations of hostility toward union supporters.

The company rule requiring attendance before and after a holiday provides for exceptions where other arrangements are made. Clearly, Patterson's telephoning Cratty from the physician's office was a good-faith effort to make such other arrangements. In light of Patterson's call and the emergency nature of her absence, Cratty's construction of the rule was both arbitrary and vindictive. Cratty's reference to an allegedly similar application of this policy in 1975 is unpersuasive where there was no showing that the employee in that incident attempted to make other arrangements as did Patterson.

Under the guise of applying its rule against theft of company property, Respondent suspended Patterson for 3 days without pay because she typed a letter, announcing an impending union meeting, on a company typewriter allegedly during working hours. The record establishes that employees made frequent use of company equipment without rebuke. Therefore, management's excessive reaction to Patterson's modest infraction of company policy reveals its true motivation. That Respondent was punishing Patterson for her continued union activity, not for a violation of company rules, is underscored by Pettinelli's flagrantly antiunion comments to her during the disciplinary interview. Where, as here, an employer disciplines an employee for conduct which it condones in others, at a time when the employee is engaged in union activity, an inference is warranted that the employer's unprecedented condemnation was pretextual. See *Caterpillar Tractor Company*, 242 NLRB 523 (1979); *J. P. Stevens & Co., Inc.*, 240 NLRB 579 (1978). Accordingly, I conclude that Respondent violated Section 8(a)(1) and (3) of the Act by denying holiday leave pay to Patterson in December 1979 and by suspending her for 3 days without pay on April 29, 1980.

However, I do not find sufficient proof of discrimination in Respondent's decision to deny sick leave pay for Cornish's absence on December 18, 1979, nor in its refusal to grant Patterson a day of vacation leave in lieu of a personal day off in March 1980.

Brutchi testified in a forthright manner and had no particular reason to fabricate the story about her encounter with Cornish in a department store. On the other hand, Cornish's insistence that she was home ill the entire day did not ring true. The practice of substituting a vacation day for a personal day was, by Patterson's admission, one which was in use prior to her first discharge. Since no evidence was presented that such substitutions were allowed after publication of the Company's manual in April 1979, nor that Patterson was treated disparately in this instance, I cannot conclude that Respondent's conduct on these two occasions was illegal under the Act.

CONCLUSIONS OF LAW

1. By terminating Marjorie Charlier and Susan Armstrong because of their union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By denying Doris Cornish permission to take vacation leave in February 1980, denying Janet Patterson holiday pay on December 24 and 25, 1979, and by issuing a warning to and suspending Patterson for 3 days without pay commencing April 29, 1980, in reprisal for their union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not violate the Act by denying sick leave pay to Doris Cornish for her absence from work on December 18, 1979, nor by denying Janet Patterson's request to substitute a day of vacation leave for a personal day in March 1980.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act. The recommended Order also will provide that the Respondent offer the discriminatees, Marjorie Charlier and Susan Armstrong, full and immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other benefits, rights, and privileges, and make them whole for all losses of earnings and benefits caused by Respondent's unlawful termination from the date of their unlawful discharges to the date of an offer of reinstatement, less net earnings during such period to be computed on a quarterly basis as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and

Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 137 NLRB 716 (1962). I also shall order that Respondent make Janet Patterson whole in the same manner for all earnings lost by reasons of the denial of her holiday leave pay on December 24 and 25, 1979, and her unlawful 3-day suspension without pay commencing April 29, 1980. Also, Respondent shall be required to remove any recordation of the suspension warning from Patterson's personnel file and deliver such documents to her. *Certain-Teed Insulation Company*, 251 NLRB 208 (1980).

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Five Star Air Freight Corporation, Essington, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating, suspending, or warning employees, or discriminating against them in any other manner, with regard to their hire or tenure of employment or any term or condition of employment because they have engaged in activities on behalf of a labor organization.

(b) Threatening employees with discharge or other reprisals for engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer to Marjorie Charlier and Susan Armstrong full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them and Janet Patterson whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision entitled "Remedy."

(b) Remove any recordation of the suspension warning issued to Janet Patterson on April 29, 1980, and deliver such documents to her.

(c) Preserve and, upon request, make available to the Board or its agents, for its examination and copying, all payroll and other records necessary or useful in order to analyze and determine the amount of backpay due under this Order.

(d) Post at its offices in Essington, Pennsylvania, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 4, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that, insofar as paragraphs 5(b) and (e) of the amended complaint allege other violations of the Act which have not been found, those allegations are hereby dismissed.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all sides had the opportunity to give evidence, an administrative law judge of the National Labor Relations Board has found that we violated the National Laabor Relations Act, and has ordered us to post this notice.

WE WILL NOT terminate, suspend, discriminate, warn, or retaliate against our employees in regard to their hire or tenure of employment or any term or condition of their employment because they have engaged in activities on behalf of a labor organization.

WE WILL NOT threaten our employees with discharge or other reprisals because they engaged in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer to Marjorie Charlier and Susan Armstrong full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, and pay them and Janet Patterson for any loss of earnings they may have suffered because of our discrimination against them, with interest.

FIVE STAR AIR FREIGHT CORPORATION